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Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

LOUIS V. NESE,

Petitioner,

v.

JULIAN NORDIC CONSTRUCTION COMPANY and ADMINISTAFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Seventh Circuit affirmed the judgment of the district court's grant of summary judgment in favor of the employer and human resource provider on employee's Americans with Disabilities Act (ADA) claim. The Seventh Circuit held that there was insufficient evidence to conclude that the employee was perceived as disabled and unable to perform a broad range of jobs. However, the employer and human resource provider were aware of employee's seizure disorder at the time that employee's wages were reduced and at the time of his termination. Notwithstanding employee's status as an at will employee, the employer and human resource provider altered employee's personnel records so as to concoct a pretextual reason for the employee's termination.

In *Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (2001) the Sixth Circuit held that evidence that the company created a pretextual reason for the employee's termination may tend to prove that it regarded the employee as disabled. In such a situation where the employer concocted a pretextual justification for that firing, the need for more extensive factual inquiry"—*i.e.*, by a trier of fact—"into whether the employer engaged in unlawful discrimination is especially acute. *Id.* In this matter, the Seventh Circuit declined to follow *Ross*.

One question presented:

1. Where a plaintiff presents significant evidence that his employer concocted a pretextual justification to terminate his employment and this act was motivated by the employer's fear that plaintiff suffered from a seizure disorder, should the determination of whether the employer regarded plaintiff as substantially limited in working be left for a jury to decide?

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OPINION BELOW

The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division in Case No. 02 C 5839 was issued by Judge John W. Darrah on May 25, 2004. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Nese v. Julian Nordic Construction Company and Administaff*, 405 F.3d 638 (7th Cir. 2005). *See* Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The Seventh Circuit's opinion was rendered on April 27, 2005. No request for rehearing was made to the Seventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 12101(a)(4).

The Americans with Disabilities Act.

(a) Findings

The Congress finds that—

> (4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

Title 42 United States Code, Section 12102(2)

Equal Opportunity for Individuals with Disabilities

(2) Disability

The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

STATEMENT OF THE CASE

1. Nese asserts in this case that his employer ("Nordic") and its human resource provider ("Administaff") concocted a pretextual basis to terminate his employment when they became aware that Nese had contacted a legal advocacy group that was investigating a potential discrimination suit on Nese's behalf against Nordic and Administaff.

On February 6, 2002 Nordic had communications with Administaff wherein the two parties discussed, via an exchange of facsimiles, the fact that Nese suffered from a disability and asked whether Nese ever asked his employer for accommodations. *See* Appendix C at 24a. In that same February 6, 2002 facsimile, Nordic and Administaff addressed whether any performance issues were documented in Nese's personnel file.

Thereafter, on February 11, 2005 two documents within Nese's personnel records were faxed back and forth between Nordic and Administaff. These two documents (an employee status change report and performance evaluation) were then altered. *See* Appendices D–F. Nordic and Administaff altered the employee status change report, completed one year earlier, to now include in the remarks section, "Work pace is not to standards of peers." The performance evaluation was altered to include language consistent with this them—that Nese's pace of work was deficient.

Despite the clear-cut evidence that Nordic and Administaff (i) discussed Nese's disability and (ii) then doctored records within his personnel file so as to concoct a pretextual justification for his termination, the District Court and the Seventh Circuit dismissed this evidence. The District Court gave defendants the benefit of the doubt by assuming that Nordic was simply "less than forthcoming in identifying the reason for [Nese's] termination." The Seventh Circuit also examined the evidence in a light most favorable to the defendants when they reasoned that sometimes employers take an employment action for one reason, but provide a different explanation to the employee.

Here, Nese provided concrete evidence that Nordic and Administaff conspired to concoct a pretextual justification to terminate his employment due to a perceived belief that Nese was disabled. Clearly, a reasonable juror could conclude that Nordic and Administaff invented this pretextual basis for termination because they regarded Nese as disabled.

2. On August 28, 2002, Nese filed his complaint in the Northern District of Illinois, Eastern Division. On December 5, 2003, Nordic and Administaff filed a motion for summary

judgment. On May 25, 2004 Judge John W. Darrah granted Defendants' Motion for Summary Judgment.

3. Nese filed his Notice of Appeal on June 23, 2004. The Seventh Circuit's decision was entered on April 27, 2005.

REASONS FOR GRANTING THE PETITION

As many Circuit Courts of Appeal have previously recognized, proving that an employee is regarded as disabled in the major life activity of working creates a nearly impossible hurdle for a plaintiff to overcome. Given that the answer to such a question is completely rooted in the subjective state of mind of the employer, an ADA plaintiff with a legitimate claim is prevented from presenting his or her claim to a jury. Given these hurdles, the Sixth Circuit Court of Appeals has held that "where there is substantial evidence that an individual's medical status played a significant role in an employer's decision to fire that individual, combined with evidence that the employer concocted a pretextual justification for that firing, the need for more extensive factual inquiry"—*i.e.*, by a trier of fact—"into whether the employer engaged in unlawful discrimination is especially acute." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (6th Cir. 2001). Therefore, "evidence that the company created a pretextual reason for [the plaintiff's] firing may tend to prove that it regarded [the plaintiff] as a disabled employee." *Id.*

Two Circuit Courts of Appeal, the Seventh and Tenth, have declined to follow the approach articulated by the Sixth Circuit in *Ross*. Given this split amongst circuit courts coupled with the millions of people that seek the protection of the ADA, this Court's guidance is urgently warranted.

Based upon the burden of proof established in most federal districts, the current ADA plaintiff is asked to play the role of mind-reader when presenting evidence necessary to carry his or her burden. The holdings released by the Seventh and Tenth Circuit Courts of Appeal rely upon the notion that employers will as times wish to fire an employee, but not want to articulate the actual reason for the firing. Such scenarios would clearly seek to avoid "hurt feelings" or excuse the employer from having to admit the real, and at times, nonsensical reasons for termination.

However, this line of reasoning results in the District Court examining the facts in a light most favorable to the *employer*, given that clear evidence of pretext can be excused under the theory that such *shenanigans* do not amount to discrimination.

The instant case is a perfect example of an employee whose perceived medical condition motivated his employer and human resource provider to concoct a legitimate basis to terminate his employment. Here, the plaintiff actually provided the District Court with a memo exchanged via facsimile between the employer and the human resource provider wherein they discussed (i) concerns regarding the employee's medical status and (ii) their plans to concoct a legitimate basis to terminate him. Notwithstanding the "smoking gun" evidence presented in the form of doctored personnel records and exchanged facsimiles and personnel records, Nese was unable to present his case to a jury.

The reason Nese was unable to overcome summary judgment was the extraordinary burden placed upon him to provide evidence that his employer believed he was unable to perform a broad class of jobs. Such a standard creates an

overbreadth wherein ADA claimants with legitimate causes of action are deprived of their ability to present their case to a jury.

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL REGARDING THE APPLICATION OF *ROSS* AND AN ADA PLAINTIFF'S BURDEN IN PROVIDING EVIDENCE THAT HE WAS UNABLE TO PERFORM A BROAD CLASS OF JOBS.

The Seventh Circuit was required to examine the evidence in a light most favorable to Nese, with all inferences drawn in his favor. *Lister v. Stark*, 942 F.2d 1183, 1187 (7th Cir. 1991). The evidence presented to the District Court and Seventh Circuit established that at various times throughout Nese's employment at Nordic he was asked questions about the medications he took to control his seizure disorder. Further, that after Nese began to experience problems at work due to what he perceived as discrimination, he contacted a legal advocacy group to conduct an investigation on his behalf. That after Nordic and Administaff became aware of this investigation; the two parties corresponded concerning Nese's seizure disorder and thereafter altered Nese's personnel records to articulate a legitimate basis to terminate his employment.

The District Court and Seventh Circuit improperly drew conclusions from the above evidence as the result of policies expressed primarily in the matter of *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944 (2000). *Moore* provides that evidence that the employer may have been less than forthcoming in identifying the reasons for termination does not establish a disability—that pretext does not amount to

discrimination. Hence, *Moore* permits the Court to draw conclusions from the evidence of pretext that shields the employer from liability.

The Seventh Circuit's reliance on such a theory fails to appreciate the major differences between *Moore* and cases similar to the instant matter. In *Moore*, the Defendant consistently stated that its basis for termination was the restrictions placed upon Moore following his work physical. *Id.* at 953-954. Moore argued that the real reason he was fired was that he was about to become eligible for health benefits. *Id.* at 955. Moore's evidence to support this theory was the proximity between his discharge and his eligibility for health benefits. *Id.*

Unlike *Moore*, Nese has presented direct evidence that his employer concocted a basis to terminate him. Unlike a left-field theory utilized to counter a reasonable justification for the firing, Nese proved that records within his employment file were altered to include language supporting the Defendants' proffered explanation. Unlike *Moore*, this case has significant evidence that the Defendants concocted a pretextual basis for the termination.[1]

The Seventh and Tenth Circuit's reliance on this theory contradicts the rationale expressed in *Ross v. Campbell Soup*

[1] The evidence presented to the jury will establish that the employee status change report was initially completed and signed by Nordic Construction's President on March 12, 2001. Then in February of 2002, Administaff personnel questioned Nordic as to whether it had documented any work deficiencies for Nese. When Thomas Julian was asked whether is was possible that he altered and/or changed the March 12, 2001 record at some point in 2002, he stated that he did not know.